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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

EDGAR T.,	
Plaintiff and Respondent,	G027329
v.	(Super. Ct. No. 98P000968)
PALMIRA C.,	O P I N I O N
Defendant and Appellant.	

Appeal from an order of the Superior Court of Orange County, Jonathan H. Cannon, Judge. Reversed and remanded.

Goodwin & Wynen, Vincent L. Goodwin and Kathleen M. Wynen for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

* * *

Appellant Palmira C. appeals from an order denying a motion to set aside a stipulation to accept the results of prior genetic testing in this paternity action. She claims her prior attorney entered into this stipulation without her knowledge or consent, and that it was an abuse of discretion for the court to deny her motion to set aside the stipulation. We agree and therefore reverse and remand.

I

FACTS

In 1988, appellant met and began dating Humberto C. In December 1988, they began cohabitating on weekends. During this period, appellant was also intimate on occasion with respondent, Edgar T. In January 1989, appellant became engaged to Humberto and discovered she was pregnant. She claims she advised respondent she was pregnant, and he encouraged her to have an abortion. (Respondent disputes this, claiming that he did not learn the child might be his until 1996.) Appellant and Humberto were married in March 1989 and have been married continually since that date. Carlos C. was born in September 1989. Humberto has held himself out as the child's father and is listed as the father on the child's baptismal and birth records.

Appellant apparently maintained some relationship with respondent's family. She claims she was "foolishly" talked into submitting to blood tests in 1997, after someone in the family noticed a resemblance between the child and respondent. The tests purportedly revealed a high probability that respondent was the child's biological father.

On May 6, 1999, almost ten years after the child's birth and more than two years after the blood tests, respondent filed a "Notice of Motion for Genetic Tests." He asked the court to accept the results of the prior blood tests, or in the alternative, to order new tests. He claimed that because appellant and her husband were not married and cohabitating at the time the child was conceived, he was entitled to request testing under

Family Code section 7551. Appellant, through her attorney, Gerald L. Klein, filed an opposition to the motion, arguing respondent had no standing to request genetic testing.

The hearing on respondent's motion took place on December 6, 1999. Appellant's attorney stipulated the 1997 genetic tests would be accepted as conclusive evidence of paternity, and the court admitted the tests into evidence. The court then found that respondent was the biological father of the child and indicated that "reunification" between respondent and the child was the court's intention. Further action was stayed 60 days to allow appellant to file a separate action in the juvenile court to terminate respondent's parental rights.

It is unclear whether appellant was actually in the courtroom during this hearing, although she was in the courthouse. If appellant was present, she did not speak and she was not queried by the court regarding her consent to the stipulation. Appellant claims she never granted her attorney authority to enter into the stipulation, and two days after the hearing, she sent her attorney a letter asking him to inform respondent and the court that she had not consented to the stipulation. When he refused, she fired him and retained new counsel. Appellant's new attorney filed a motion pursuant to Code of Civil Procedure section 473 to relieve appellant of the stipulation. Although the motion was unopposed, the court denied the motion. The court stated that because appellant was represented by counsel at the time, the court would "assume that, in spite of her declaration, the stipulation was entered into in good faith with full knowledge." This appeal followed.

II

DISCUSSION

Standard of Review

A motion for relief under Code of Civil Procedure section 473 is addressed to the sound discretion of the trial court and an appellate court will not interfere unless there is a clear showing of abuse. (*Davis v. Thayer* (1980) 113 Cal.App.3d 892, 904.)

The discretion conferred upon the trial court, however, is not a "'"capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised *ex gratia*, but a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice."' [Citations.]" (*Carroll v. Abbott Laboratories, Inc.* (1982) 32 Cal.3d 892, 898.)

Attorney's Authority to Enter into Stipulation

An attorney is authorized "[t]o bind his [or her] client in any of the steps of an action or proceeding . . . ." (Code Civ. Proc., § 283, subd. 1; see also *Linsk v. Linsk* (1969) 70 Cal.2d 272, 276.) However, an attorney is not authorized to impair the client's substantial rights. (*Blanton v. Womancare, Inc.* (1985) 38 Cal.3d 396, 404; see also *Levy v. Superior Court* (1995) 10 Cal.4th 578, 584.)

The stipulation here was not merely a procedural or tactical step taken in litigation, which is left to the sound discretion of an attorney. (See *Blanton v. Womancare, Inc.*, *supra*, 38 Cal.3d at p. 404.) It sought to resolve with finality any issue of paternity. "If the dispute [in a family law matter] is substantially resolved by virtue of the stipulation, it is tantamount to the settlement and dismissal of the typical civil case which . . . cannot stand if the client can demonstrate a lack of authorization." (*In re Marriage of Helsel* (1988) 198 Cal.App.3d 332, 339.)

Appellant argues she did not authorize Klein to enter into the stipulation accepting the 1997 blood tests as conclusive evidence of paternity. The record supports appellant's argument. Appellant's declaration states under penalty of perjury that she did not grant Klein actual or apparent authority to enter into the stipulation. She was not questioned by the court regarding her agreement to the stipulation (even if she was present during the hearing, which is unclear), and she did not take any steps to ratify her attorney's actions. To the contrary, she wrote him a strongly worded letter two days after

the hearing, asking him to advise the court and opposing counsel she had not been consulted and had not agreed to the stipulation. When Klein refused, she retained new counsel.

The record does not disclose any facts contradicting appellant on this point, and the rationale stated by the trial court as grounds for denying appellant's motion for relief is ultimately unpersuasive. The only reason stated by the court for denying the motion is that appellant was represented by counsel; therefore, the court "assume[s] that, in spite of her declaration, the stipulation was entered into in good faith with full knowledge." But the mere act of being retained by a client does not authorize an attorney to enter into agreements directly impacting a litigant's substantial rights. (*Blanton v. Womancare, Inc. supra*, 38 Cal.3d at p. 404.) Actual authorization is required. The uncontradicted facts before the trial court demonstrated Klein did not have appellant's authorization to enter into the stipulation. Disregarding those facts and resting its decision only on the "assumption" that appellant had authorized the stipulation, without any facts to support that assumption, was an abuse of the court's discretion.

Actual Prejudice

Denying appellant's motion for relief from the stipulation resulted in actual prejudice because the stipulation caused this case to be resolved in a manner contrary to the applicable law. (Code Civ. Proc., § 475 [if different result probable but for the error, the error is prejudicial].)

Paternity decisions in California are governed by the Uniform Parentage Act. (Fam. Code, § 7600 et seq.) Under Family Code section 7611, subdivision (a), a man is presumed to be the natural father of a child born during his marriage. Thus, appellant's husband, Humberto, is the presumed father of the child, who was born during their marriage. A man also attains the status of presumed father if he receives the child

into his home and holds out the child as his. (Fam. Code, § 7611, subd. (d).) Humberto also has the status of presumed father under this provision.

Because the child was not conceived while appellant and her husband were cohabitating as a married couple, these presumptions are rebuttable rather than conclusive. (Compare Fam. Code § 7540 [presumption of paternity is conclusive if child conceived while husband and wife are cohabiting].) Only someone with legal standing, however, may bring an action to challenge the presumption of paternity. Family Code section 7630, subdivision (a), restricts standing to the child, the child's natural mother, or a presumed father. Because respondent does not fit into any of these categories, he has no standing to seek genetic testing.

The California Supreme Court addressed similar facts in *Dawn D. v. Superior Court* (1998) 17 Cal.4th 932. In *Dawn D.*, the mother had sexual relations with Jerry K. while separated from her husband. (*Id.* at p. 936.) She returned to her husband, and the child was born during the marriage. (*Ibid.*) Jerry K. sought genetic testing. Upon review of the mother's petition for a writ of mandate, the California Supreme Court held that Jerry K. had neither statutory nor constitutional grounds to establish paternity. (*Id.* at p. 944.)

As in this case, because the child was not conceived while a husband and wife were cohabiting, the mandatory presumption of Family Code section 7540 did not apply, but the rebuttable presumption of Family Code section 7611 (a), subdivision, did. (*Id.* at pp. 934, 937.) The putative father, however, did not have standing to seek genetic testing under the Family Code: "The [Uniform Parentage] Act, however, restricts standing to challenge the presumption of a *husband's* paternity to the child, the child's natural mother, or a presumed father. [Citations.] The Act thus precludes Jerry from bringing this paternity action and, therefore, from compelling Dawn and the child to submit to blood tests to resolve the question of biological parenthood. (See §§ 7551 [court may order blood tests in a civil action or proceeding in which paternity is a

relevant fact] . . . .)" (*Dawn D. v. Superior Court*, *supra*, 17 Cal.4th at pp. 937-938, original italics.) Family Code section 7551 is the statute under which respondent argues testing is appropriate. The court further held that Jerry K. had no "constitutionally protected liberty interest defeating California's statutory presumption favoring the husband." (*Id.* at p. 935.)

Based on this clear statement of the law under similar facts, there is no question that if a hearing on the merits of respondent's motion had been held, the court would have been required to find in appellant's favor. Because the outcome would have been dramatically different if this case had proceeded to a hearing on the merits, appellant was clearly prejudiced by the court's denial of her motion to be relieved from the stipulation.

III

DISPOSITION

The order denying appellant's Code of Civil Procedure section 473 motion is reversed. This case is remanded for further proceedings consistent with this opinion. Appellant is entitled to costs on appeal.

MOORE, J.

WE CONCUR:

O'LEARY, ACTING P. J.

ARONSON, J.